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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

REPLY OF PETITIONERS TO RESPONDENTS' SUPPLEMENTAL BRIEF

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FIDELITY PRINTING COMPANY, HOUSTON

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PRELIMINARY STATEMENT

Respondents' Supplemental Brief contains such blatant distortions of the record that it necessitates this reply. These distortions are an obvious attempt to create the impression that this Petition for Writ of Certiorari seeks nothing more than review of disputed fact questions. This is not the case. This Petition involves substantial legal questions that should be resolved by this Court. This reply shows that Respondents resorted to these record distortions because there was no other way to justify the results reached by the courts below.

ARGUMENT

I.

Petitioners Did Not "Request" the District Court to Read to the Jury the Prior Jury's Verdict.

Respondents' repeated contention that Petitioners "invited" or "requested" the trial court to read to the jury,

as part of its charge, the prior jury's verdict is incredible and untrue. During the lengthy pretrial conference, counsel for Petitioners argued for literally hours that the prior jury's verdict should not be read in whole or in part to the second jury.

Respondents' statement that counsel for Petitioners "conceded" that reading the prior verdict at the outset of the trial might be favorable to Petitioners, Supplemental Brief at 2-3, is equally unsupportable. A review of the record references cited by Respondents confirms that there was no such concession. Justice Clark suggested to Mr. Jeffers, counsel for Petitioners, that reading the prior verdict to the jury could have a favorable impact on Petitioners' case, because the jury might think Respondents had already been awarded sufficient damages. Mr. Jeffers responded as follows:

> Well, I think that is a rather remote likelihood.
>
> They could view it as the plaintiff has gotten enough already and the defendants have been punished enough already by this amount of money, so we won't give them anymore, but I think the more likely inflammatory result of this is that they are really bad people, that the other jury really laid it on them and they didn't even have this extraction plant before them, so they have set the example, they have set the pace, we'll keep up with them. We will follow suit. If they've already looked at this and found what bad people these people are and how they are to be punished so we won't depart from it.

(Court of Appeals Record, 73-1633 pp. 395-96). This statement is consistent with Petitioners' contention throughout the pretrial conference that reading the prior verdict to the jury would have a devastating effect on Petitioners' case and would deny them a fair trial.

At the conclusion of the evidence, counsel met in chambers with Justice Clark to formulate the jury charge. The charge prepared by the Court contained an incorrect and unfair summary of the prior jury verdict. Mr. Jeffers objected to the summary as being

> "immaterial and irrelevant to any issue in this case, and the [jury verdict] has no probative value or force to aid or assist the jury in any way in passing upon the issues to be determined by the jury in this case. On the contrary, it's completely incompetent and highly inflammatory and prejudicial, and it conveys to the jury the effect and the impression that the defendants are law violators, criminal conspirators; that a former jury had decided against them and that they should do likewise.
>
> . . . [The charge] does not constitute a full and fair statement of the jury finding in the former trial . . .

Then the following colloquy occurred:

> THE COURT: Would you object if I gave the whole verdict to them?
>
> MR. JEFFERS: We object to giving any of it, but our position is if the Court is going to comment on any of it at all, that it must be a fair and complete comment, but our basic position is —
>
> THE COURT: I'll put it all in like I did the other way [day?].
>
> MR. JEFFERS: That it's erroneous to give the jury anything about the former verdict.
>
> THE COURT: I understand your position, but since you raise the point, the Court feels that the theory of the case requires the use of the findings, and so, the Court will quote all of the findings.

MR. JEFFERS: To which we will object and except, ..."

(Court of Appeals Record, 73-1633, pp. 3948-51)

Respondents also assert that the reading of the verdict was somehow favorable to Petitioners "because of the amount of evidence the trial judge allowed regarding Petitioners' claim of drainage of gas beneath Alcoa's and Crown's leases, ..." Supplemental Brief at 2. This allegation, whatever it means, is baseless. At the first trial, Judge Singleton excluded all evidence of drainage of gas from beneath Petitioners' land because he thought this evidence applied only to the issue of "false nominations," which he had already disposed of by summary judgment. Thus the jury verdict read to the second jury made no reference whatsoever to drainage. Surely Respondents' insistence on these baseless points confirms that it cannot otherwise justify the clear error of reading to the second jury the first jury's verdict.

II.

The Liability Issue Should Not Have Been Excluded From the Second Trial.

Under III of the Supplemental Brief, Respondents appear to say that the trial court properly refused to submit the issue of antitrust liability to the second jury because: "The general manager of Alcoa admitted that the restriction on production and transportation directly affected the extraction of the by-products." No record reference is given. Since the extraction plant issue was excluded from the first trial the quoted testimony was presumably given at the second trial. Respondents are thus contending that Justice Clark's decision at the outset of the second trial to exclude the liability issue was based

on testimony given two weeks later, near the end of the trial. This suggested rationale for the exclusion of the liability issue is thus clearly specious.

Moreover, even if it is assumed that the monopoly that the first jury found Petitioners had over transportation and production of natural gas "affected" the extraction of liquid by-products, it does not follow that a liability issue as to these liquid by-products should have been excluded from the second trial. Petitioners have demonstrated that the distinct relevant market of the extraction of liquids was not involved in the first trial. It is well settled that the offense of monopolization requires a finding of monopoly power in a relevant market. At the first trial there was no evidence of or jury finding on Petitioners' power over the relevant market of extraction of natural gas by-products in the Appling Field. Thus no logical basis exists for the court's holding that the prior jury verdict on monopolization of production and transportation equaled monopolization of extraction. *Overseas Motors Inc.* v. *Import Motors Ltd.*, 1975 Trade Cases ¶ 75,242 (E.D. Mich. 1975).

III.

At the First Trial All Evidence of Production of Natural Gas in the Appling Field Was Excluded.

Petitioners stand convicted of monopolizing the production and transportation of natural gas from the Appling Field even though the jury that convicted them never heard one scintilla of evidence on the relevant market shares of the competitors in the Appling Field based on the actual production of gas from the Field. Petitioners have argued in this Court and the courts below that the exclusion at the first trial of all evidence of natural gas production in the Appling Field requires a new trial.

Respondents now try to reply to this argument by making a gross misstatement of the record. Respondents say at page 4 of their Supplemental Brief that "[t]he trial court permitted evidence of the production in both trials." This is untrue. In the first place, Respondents support this statement with two record references from the *second trial*. Petitioners concede that Justice Clark admitted some production evidence at the second trial; however, that evidence had absolutely no bearing on the antitrust liability issue, because Justice Clark had ruled that issue out of the case, holding that it had been decided at the first trial in which *no* production evidence was admitted. Petitioners' objection to the exclusion of production evidence relates only to the first trial.

Respondents' two record references under IV of their Supplemental Brief are apparently intended to show that even if no production evidence was admitted at the first trial, if it had been, it would have shown that Petitioners monopolized production and transportation of natural gas in the Appling Field. In fact, these references show the opposite. Mr. Tanner did testify that Petitioners leased the great majority of the Appling Field. Petitioners concede that they leased approximately 85 percent; however, as discussed in detail in Petitioners' prior briefs to this Court, it is undisputed that ownership of 85 percent of the surface acreage did not translate into 85 percent of the gas production.

Respondents correctly state that Mr. Minter of Alcoa testified that he had once predicted that over the life of the Appling Field Respondents and other small tract operators would produce slightly in excess of 30 percent of the natural gas from the Field at a cost of $31.6 million to Petitioners in gas pumped from under their land. Respondents neglect, however, to say that this prediction was made

before there was substantial production from the Field; and the final figures compiled after depletion of the Field reflected that the small tract operators produced approximately 50 percent of the gas. (Court of Appeals Record, 73-1633, Defendants' Exhibits 30, 52). It is well established that such a market share does not constitute monopoly power. See Reply Brief of Petitioners at 15-16. Once again Respondents' record distortions confirm they have no answer to the obvious injustice that resulted from the exclusion of all production evidence from the first trial.

IV.

Instruction 32 Should Not Have Been Given

In Petitioners' two briefs to this Court, they have shown that Instruction 32 was improper under the controlling law and under the facts of the case. Respondents now try to justify that instruction with a quotation from the trial court's opinion and two record references.

The trial court's statement that "[t]here was testimony that Alcoa caused a shutdown of Woods' wells on a spurious complaint; . . . ." is completely contrary to the evidence. Apparently the court had reference to complaints by Petitioners to the Texas Railroad Commission that Respondents' wells had insufficient surface casing under Railroad Commission rules designed to protect shallow water bearing sands. Such complaints are normal and customary in the industry. These complaints were the only legal or administrative actions taken by Petitioners that ever caused a "shutdown" of Respondents' wells. Brief reference was made at a trial to the surface casing problem by Mr. Allison, a witness for Petitioners, but when the questioning was pursued, the trial court sustained Petitioners' objections, stating "I really don't see the relevancy of the depth of the water pipes [surface casing]." (Court of

Appeals Record, 73-1633, pp. 3053-54, 3058, 3098, 3101). Thus the testimony on these complaints of causing a shutdown was struck as irrelevant. Respondents did not develop it and Petitioners had no opportunity for reply. Moreover, certainly no evidence was introduced that Petitioners' claims on surface casing were "spurious."

The quoted passage from the court's opinion on "standing instructions to file suits" relates to Petitioners' challenge to multiple completions by Respondents under Rule 37 of the Texas Railroad Commission. As explained at page 33 of the Petition for Writ of Certiorari, Railroad Commission rules required a separate suit challenging each new completion. Thus the multiple suits filed by Petitioners against Respondents and Joe Williams were not a matter of choice but were required to protect Petitioners' legal rights. No decision of any court makes these lawsuits part of an illegal scheme simply because more than one was filed.

In the final paragraph under V of their Supplemental Brief, Respondents attempt to show that Petitioners' legal and administrative actions against Respondents were illegally motivated. Mr. Woods, hardly a disinterested witness, gave uncorroborated testimony of the supposed threats made by Mr. Allison, an attorney for Alcoa. Mr. Allison categorically denied these threats. (Court of Appeals Record, 73-1633, pp. 3053-57; 3063-66).

Mr. Woods also gave uncorroborated testimony that an Alcoa attorney, who was deceased at the time of the second trial, had told him that Alcoa would not challenge the Railroad Commission's rules because they were valid with respect to the Appling Field, and yet, nevertheless, Alcoa sued. Interestingly, Mr. Woods never testified to these statements at the prior trial of this case or at the various state court cases between the instant parties. At the time of those actions, the Alcoa attorney was alive and could

have rebutted Mr. Woods' testimony. He died shortly before the instant trial at which Woods' allegations appeared for the first time. Moreover, it is incredible to suggest that counsel for Alcoa would have made such a statement. Alcoa had determined that the operation of the ⅓-⅔ and multiple completion rules in the Appling Field would cost Petitioners $31.6 million over the life of the Field in gas pumped from under its land by Respondents and other small tract owners. It thus had a substantial interest in challenging these rules and eventually they were revised to provide for a more just allocation of the gas within the Field.

Finally, it should be noted that after the first trial judge found that the lawsuits were filed in good faith there was no suggestion by either party or any court that these actions were brought in bad faith. Not until Respondents presented their proposed charge to the court at the second trial of this case did that issue resurface. This makes clear that the charge was a last minute invention of Respondents with no justification in the record.

CONCLUSION

For the reasons stated in this brief and in Petitioners' Petition for Writ of Certiorari and Reply Brief, the Petition should be granted, the judgment of the Court of Appeals reversed, and the entire case remanded to the trial court for a single trial on the entire action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Reply of Petitioners to Respondents' Supplemental Brief were served upon Mr. Levert J. Able, 1201 First National Life Building, Houston, Texas 77002 and Mr. Herman V. Wright, Mandell & Wright, 1901 First National Life Building, Houston, Texas 77002, Counsel for Respondents, by placing the same in the United States mail, first class postage prepaid this 22 day of September, 1975, thus serving all parties required to be served.

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